IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-264

ROBERT K. SWISHER, JR.,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The Petitioner, ROBERT K. SWISHER, JR., respectfully prays that a Writ Of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this cause on May 26, 1976.

OPINIONS BELOW

The judgment and sentence of the jury entered on June 20, 1974 in this cause in the 34th District Court of the State of Texas is included in Appendix B hereto.

The opinion of the Court of Criminal Appeals of the State of Texas delivered on May 26, 1976 and affirming the District Court judgment, cause number 50,099, ___ S.W.2d ___, has been reproduced in Appendix C hereto.

The official notice of the denial of the Appellant's Motion For Leave to file Petition for Rehearing from the clerk of the Court of Criminal Appeals dated June 16, 1976 appears in Appendix D hereto.

The per curiam order of the Court of Criminal Appeals, granting the Appellant's Motion to Stay Execution of Mandate dated June 28, 1976 is included in Appendix E hereto.

JURISDICTION

The Judgment of the Court of Criminal Appeals of the State of Texas was on May 26, 1976. A Motion for Leave to File Petition for Rehearing was timely filed, and denied on June 16, 1976. This Petition for Certiorari was timely filed within ninety (90) days of both the above dates. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I.

Whether a delay of thirty-six (36) months during which the State failed to notify the accused or his attorney of the resumed prosecution against him constitutes a denial of speedy trial and due process.

II.

Whether a general, undetailed tip from an untested informant who did not give the source of his information could support the stop and search of the Petitioner's moving vehicle.

CONSTITUTIONAL PROVISIONS INVOLVED

The following portion of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

The following portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law, . . ."

The following portion of the Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, . . ."

STATEMENT OF FACTS

(1). Facts Pertaining to the Issue of Probable Cause

On October 12, 1970 at approximately 6:30 p.m. Napoleon Herrera, a Department of Public Safety intelligence agent, received information from a first-time, paid informant that Robert Swisher was going to pick up a load of marijuana in the Fabens-Tornillo area, an area of some sixteen linear miles, on the evening of October 12 or 13th, 1970 (R 11). The informant also told Herrera that Swisher would be driving one of two vehicles, a white Rambler station wagon or a white pickup (R 11). The informant gave the license number of the pickup, but not the Rambler (R 11). Herrera had never received any prior information from the informant and the informant did not tell Herrera how or when he obtained his information (R 17). Before this information, Agent Herrera had never heard of Robert Swisher (R 14). Herrera did not receive a specific description of Robert Swisher (R 14).

Based on the above, Agent Herrera contacted three Texas Highway Patrolmen and set up a surveillance in the Fabens-Tornillo, Texas area (R 19). While on surveillance Agent Herrera saw a white Rambler heading south on Farm-to-Market Road 793 and began following it (R 19). He lost the white Rambler he was following.

At about 9:30 p.m. Agent Herrera saw a white Rambler and started following it north on Farm-to-Market Road 793 (R 233). Herrera then alerted the patrol unit he had on standby and continued to follow

the Rambler, which was now proceeding west on Interstate 10 (R 236). When the patrol unit was in position behind Herrera, he pulled up alongside the station wagon and shined a flashlight into the rear of the vehicle (R 237). Herrera saw some packages wrapped in packaging which he felt was similar to that used to package marijuana. However, he admitted that he was sure that the same packaging could be used to wrap other items (R 32). Herrera then requested the patrol car to stop the station wagon (R 237). Three Highway Patrol officers in the one patrol unit then stopped the station wagon (R 238). Two of the officers, one with a drawn .357 Magnum and the other with a drawn shotgun, ordered the defendant out of the car (R 305). Meanwhile, Agent Herrera went to the back of the station wagon, cut open one of the packages and found what he thought to be marijuana (R 47, 238). It was at this time, after the stop and search of the vehicle, that Agent Herrera advised the defendant that he was under arrest and advised him of his rights (R 47, 239).

(2). Facts Pertaining to Denial of Speedy Trial and Due Process

After the October 12, 1970 arrest of Petitioner, a preliminary hearing was held on October 28, 1970 before Justice of the Peace Dan Snooks and a finding of "no probable cause for arrest" was entered (stipulated before and during trial by Petitioner and State: R 4, 74-75).

After being informed of this result by his attorney, Joseph (Sib) Abraham, the Petitioner left El Paso to reside in New Mexico where he is currently living (R 92).

In spite of the finding of no probable cause by the Justice of the Peace, the case was presented to the Grand Jury, which subsequently indicted the Petitioner in November of 1970 (R 379).

The documents of record in this cause reflect a gap of some thirty-six (36) months between the forfeiture of the Defendant's bond after indictment (R 384) and an order for the issuance of capias in January of 1974 (R 385). The 1970 order forfeiting the bond does not include the usual order for issuance of capias or arrest warrant (R 384). There is no indication of any attempt by the State to contact this Petitioner or his attorney in El Paso, Joseph (Sib) Abraham, between November 1970 and December 1973 (R 93, 100-101, 112).

In December of 1973 a document alleging unlawful flight to avoid prosecution was lodged with the federal authorities. After arrest and release by New Mexico authorities, the Petitioner surrendered himself to Texas authorities and made bond in March of 1974. The Defendant was tried upon a plea of not guilty on June 17, 1974. During that trial, Petitioner took the stand and testified that after learning late in 1973 that he had been indicted on the 1970 charge, he attempted without success to obtain witnesses on both the merits and on his character and reputation (R 83-92). Petitioner attributed this failure to the thirty-six (36) month delay.

The Petitioner was found guilty and was sentenced to seven (7) years imprisonment.

The Petitioner gave notice of appeal to the Court of Criminal Appeals after his sentencing in June of 1974, and his conviction was affirmed by that Court some

two (2) years later on May 26, 1976, Justice Roberts dissenting. Petitioner was denied leave to file motion for rehearing on June 16, 1976. The execution of mandate was stayed by a per curiam order of the Court of Criminal Appeals on June 28, 1976, pending decision upon the Petitioner's application for a writ of certiorari from the Supreme Court of the United States. The Petitioner is currently on bond.

REASONS FOR GRANTING THE WRIT

(1) Whether a delay of thirty-six (36) months during which the State failed to notify the accused or his attorney of the resumed prosecution against him constitutes a denial of speedy trial and due process.

A.

This Court has made it clear that the right to a speedy trial is as fundamental as any right protected by the Sixth Amendment. *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed. 2d 183 (1973). In *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the standards applicable to the problem of a speedy trial were announced, and included the evaluation of the facts of each case in regard to four factors: (1) the length of delay; (2) the reason for delay; (3) accused's assertion of right, and (4) prejudice to the accused. The *Barker* Court also pointed out two other important considerations: first, that it is the State, not the Defendant, who has the duty and responsibility of bringing the Defendant to speedy trial, as well as insuring that this trial comports with the principles of due process, *Barker*, 33 L.Ed. at 115; secondly, that there should be no rigid "demand-waiver" rule which would foreclose

raising of a speedy trial question where there had been no demand, *Barker*, 33 L.Ed. at 113-117. With the above principles in mind, the Petitioner points out that the State, the Petitioner, and the Court of Criminal Appeals all cite *Barker* and *Moore*. Thus, the real question is not whether *Barker* and *Moore* apply to the individual facts of this case, but instead, whether they were in fact actually applied.

B.

Summarizing the facts and dates applicable to the issue of speedy trial and due process, we come up with the following trisected table:

	(1)
October 1970	Arrest of Petitioner.
October 1970	Preliminary Hearing with finding of No Probable Cause (R 74-75).
November 1970	Petitioner leaves El Paso for New Mexico (R 92).
November 1970	Grand Jury indicts Petitioner.
	(2)
November 1970 to December 1973	Neither the Petitioner nor the Petitioner's attorney is notified or contacted about the continuing prosecution by the State (R 93, 100-101, 112).

	(3)
December 1973	Unlawful flight papers filed with federal authorities.
December 1973	Arrest of Petitioner.
March 1974	Arraignment of Petitioner.
March 1974	Petitioner makes bond.
June 1974	Trial of Petitioner.

Although the total time lapse above is some forty-four (44) months, the Petitioner wishes to focus his speedy trial complaint on the thirty-six (36) month period contained in section (2) above. During that period, immediately following the finding of no probable cause in the preliminary hearing, both the Petitioner and his attorney testified that they were not contacted or notified by the State that prosecution had resumed (R 93, 100-101, 112). This assertion is not rebutted by the State. Indeed, even the official documents on record reveal a total absence of any warrants, notices, settings, and the like from November 1970 to January 1974 (R 384, 385). The Petitioner contends that during this period he was not only deprived of his rights to a speedy trial, but was also deprived of the right and opportunity to demand a speedy trial because he had no knowledge that he was being prosecuted.

C.

The Court of Criminal Appeals of the State of Texas placed an exceedingly heavy burden of proof upon this Petitioner while placing an exceedingly light burden upon the State of Texas. The Petitioner contends that this weighted approach violates the spirit and language of *Barker*, *Moore*, and their progeny.

The Court of Criminal Appeals recognized a forty-four month delay; however, it failed to require justification or even explanation of this delay from the State, contrary to the teachings of *Barker*, 33 L.Ed. 2d at 115; *United States v. West*, 504 F.2d 253 (D.C. App. 1974). In fact, the Texas Court kept the burden squarely on the Petitioner in a comment that hearkens back to an earlier pre-*Barker* age of speedy trial law.

> "Appellant does not allege and the record does not reflect any deliberate effort by the State to delay the trial." *Swisher v. State*, No. 50,099, reproduced in Appendix C hereto.

On the issue of prejudice to the accused, the Court of Criminal Appeals took notice of the inordinately long delay, but failed to accord the Petitioner the benefit of finding that this delay was at least presumptively prejudicial, *West*, supra.; *United States v. Macino*, 486 F.2d 750 (7 Cir. 1973); *United States v. Calloway*, 505 F.2d 311 (D.C. App. 1974). Additionally, the Court recognized that the Petitioner had testified at his trial to the effect that the delay had prejudiced his attempts to secure various named witnesses whose testimony was material to the issue of guilt as well as to the issues of character and credibility (R 83-92). The Texas

Court rejected the approach of *United States v. Holt*, 448 F.2d 1108 (1971) and other federal Courts which held that only a showing of "a reasonable possibility of significant prejudice" was necessary, and demanded a much higher quantum of evidence. *Harling v. United States*, 401 F.2d 392 (D.C. App. 1968) cert. den. 393 U.S. 1068, 89 S.Ct. 725, 21 L.Ed. 2d 711 (1969).

On the issue of the accused's assertion of his rights, the Court of Criminal Appeals also departed from Supreme Court precedent. That Court found no excuse for the failure of the accused to assert his rights until six days before trial. The Texas Court ignored the thirty-six month period during which the State failed to apprise the Petitioner or his attorney of the resumed prosecution, and which is the primary basis of this Petitioner's speedy trial complaint. The Supreme Court in *Barker* rejected the premise that a demand was a condition precedent for a denial of speedy trial claim; and went on to cite the American Bar Association Project on Standards for Criminal Justice, Speedy Trial (approved draft 1968):

> "One reason for this position (rejection of demand waiver rule) is that there are a number of situations, such as *where the defendant is unaware of the charge . . .*" ABA Project, N 17 at p. 17 (Emphasis supplied)

Thus, the thirty-six months after the Petitioner thought his prosecution was ended because of a preliminary hearing with a finding of no probable cause, (R 74-75), were not waived by a lack of demand in that the Petitioner had no knowledge that he needed to demand a speedy trial (R 93, 100-101, 112).

In summary, it is evident that the Court of Criminal Appeals of the State of Texas failed to apply the standards of *Barker* and other federal cases to the facts of the Petitioner's case.

(2) Whether a general, undetailed tip from an untested informant who did not give the source of his information could support the stop and search of the Petitioner's moving vehicle.

A.

This Court's decisions in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969) set the standards for evaluating the hearsay tips of informers against the Constitutional requirements of probable cause. One major requirement imposed by this Court in *Aguilar* and *Spinelli* was that the officer making the affidavit have some basis to believe that the informer is a truthful, credible person.

Another major requirement was that there be sufficient information to conclude that the specific information given by the informant was reliable. This Court in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723, commented on the reliability of the *Harris* facts as contrasted with the facts in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697:

> "Both recount personal and recent (footnote omitted) observations by an unidentified informant of criminal activity, factors showing

> that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in Spinelli, supra, in which the affidavit failed to explain how the informant came by his information." *Harris*, 29 L.Ed. at 731.

In the absence of detailed statements as to the manner of obtaining the information, the *Spinelli* Court required that:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli*, 21 L.Ed. at 644.

The Petitioner contends that these standards of probable cause for arrests and searches under warrants are equally applicable to warrantless arrests and searches, *Whitely v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), and the above standards are just as stringent if not more stringent in warrantless cases, *United States v. Squella-Avendano*, 447 F.2d 575 (5 Cir. 1971).

B.

Looking at the facts of the instant case, it becomes immediately clear that the requirement that there be a

showing that the informant is reliable has not been met. Here, all we have is an untested, paid informer (R 11). Indeed, the record does not even reveal an unsupported assertion by the testifying officer that he thought the informant was reliable.

Turning to the requirement that there be a showing that the informant's information is reliable, we again find a deficiency. The record demonstrates that the informant did not reveal to the officer how he obtained his information or when he obtained his information (R 17). The detail of the tip did not aid in this regard, either. The informant did not give a detailed description of the suspect or his apparel (R 14). The informant did not give a specific description of the vehicle except that it would be a white Rambler station wagon or a white pickup (R 11). The informant did not give a specific time except that it would be during one of two nights (R 11). The informant did not give a specific place except that it would be in a fifteen mile area (R 16). Additionally, the informant failed to give any details as to the transaction by which the suspect was to have obtained the contraband. Clearly, the above information does not raise the tip above the mere rumors and suspicions complained of in *Spinelli* and *Aguilar*. Indeed, the Court of Criminal Appeals of the State of Texas flatly admitted the all but total deficiency in meeting the *Aguilar* requirements.

> "The underlying circumstances which led to the informant's conclusion of guilt was not shown. There was no showing that the informant was credible and reliable."
> *Swisher v. State*, No. 50,099, reproduced in Appendix C hereto.

C.

The Court of Criminal Appeals went on to hold that this clearly insufficient tip was later strongly corroborated by police observation, thereby providing the arresting officers with the requisite probable cause for the arrest and search of the Petitioner.

The police officers observed the Petitioner within the fifteen mile "suspect" area (R 16) with a white Rambler. This could only be described as totally innocuous conduct, *United States v. Larkin*, 510 F. 2d 13 (9th Cir. 1974). Indeed, the only observation which came close to the level of being suspicious conduct was that the station wagon contained packages which were packaged in a way that the officer thought was similar to the way marijuana was packaged. The officer later admitted at trial that he was "sure" that other items could be wrapped in the same manner (R 32). The officer's testimony also revealed that before opening the packages, he did not see or smell marijuana.

It was never alleged or demonstrated at trial that marijuana was a "brand name" product coming in identifiable packages. If we accept the premise that a clearly insufficient tip by a clearly unreliable informant can be corroborated by the observation of colorably suspicious containers, we accept a grave dilution of the standards of *Aguilar* and *Spinelli*. One can foresee such insufficient tips corroborated by the existence of luggage, spare tires, and car trunks after police testimony to the effect that contraband is often smuggled in such objects.

Indeed, two Circuit Courts of Appeal have found colorably suspicious containers as insufficient to corroborate an inadequate tip. The Fifth Circuit in *United States v. Soria*, 519 F.2d 1060 (5 Cir. 1975) held that the presence of a boat being pulled by a trailer did not sufficiently corroborate an unreliable tip that marijuana would be smuggled, possibly in a boat. The Ninth Circuit in *United States v. DeVita*, 527 F.2d 81 (9 Cir. 1975) also found the observation of an automobile top-carrier, luggage, and cardboard boxes to be insufficient corroboration for an unreliable tip, even though they could have contained, and in fact actually did contain, the contraband mentioned in the tip. Indeed, in both of these cases, in spite of the presence of these two vehicles in the suspect area or proceeding toward the suspect destination, and the presence of colorably suspicious containers, there were findings that the corroboration did not raise the unreliable tip to the level of reasonable or founded suspicion necessary for an investigative stop, much less to the level of probable cause. Acceptance of the holding of the Court of Criminal Appeals in regard to the instant case, would elevate unverified suspicion to the level of probable cause; dilute the standards which have been formulated by the federal judiciary at great effort; and diminish the Fourth Amendment rights of the citizens of the State of Texas.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
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El Paso, TX 79901
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of August, 1976.

APPENDIX A

In the
DISTRICT COURT OF EL PASO COUNTY, TEXAS
THIRTY FOURTH JUDICIAL DISTRICT

No. 23,527

THE STATE OF TEXAS

v.

ROBERT K. SWISHER, JR.

INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

The Grand Jurors for the County of El Paso, State aforesaid, duly organized as such, at the November Term, A.D. 1970, of the Thirty-fourth Judicial District Court for said County upon their oaths in said Court, present that ROBERT K. SWISHER, JR. on or about the 12th day of October One Thousand Nine Hundred and Seventy and anterior to the presentment of this indictment, in the County of El Paso and State of Texas, did then and there unlawfully have under his control

and possession certain narcotic drug, to-wit: Marihuana, against the peace and dignity of the State.

/s/ Robert E. Sympson
Robert E. Sympson,
Foreman of the Grand Jury

ENDORSED: NO. 23,527. Filed the 19th day of November, 1970, J.W.A. JOHNSON, Clerk, Thirty-fourth Judicial District Courts. El Paso County, Texas by /s/ Earl N. Forsyth, Deputy.

APPENDIX B

In the
DISTRICT COURT OF EL PASO COUNTY, TEXAS
THIRTY FOURTH JUDICIAL DISTRICT

No. 23,527

THE STATE OF TEXAS

v.

ROBERT K. SWISHER, JR.

JUDGMENT

charge: Possession of a Narcotic Drug, to-wit: Marijuana; date: June 18, 1974.

THIS DAY, this cause was called for trial, and the State appeared by her District Attorney, and the Defendant appeared in person, his counsel also being present, and both parties announced ready for trial; and the Defendant, Robert K. Swisher, Jr., having been duly arraigned and having pleaded "Not Guilty" to the charge contained in the Indictment herein; thereupon a jury, to wit: Carl F. Thomas and eleven others, was duly selected, impaneled and sworn, who having heard the Indictment read, and the Defendant's plea of Not Guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, to consider their verdict, and afterwards were brought into open Court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict which was received by the Court, and is here now entered upon the Minutes of the Court, to wit:

THE STATE OF TEXAS Date: June 20, 1974

v.

Robert K. Swisher, Jr. No. 23,527

WE, the Jury, in the above styled and numbered cause, find the Defendant, Robert K. Swisher, Jr. guilty of Possession of a Narcotic Drug, to-wit: Marijuana, as charged in the Indictment.

/s/ Carl F. Thomas

*Whereupon, the Defendant having requested that the punishment be assessed by the same jury, who,

having heard the evidence offered with regard to punishment and having been again duly charged by the Court, retired in charge of the proper officer to consider their verdict on punishment, and afterwards were brought into open court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the court to wit:

THE STATE OF TEXAS Date: June 20, 1974

v.

Robert K. Swisher, Jr. No. 23,527

WE, the Jury, having found the Defendant Robert K. Swisher, Jr. guilty of Possession of a Narcotic Drug, to-wit: Marijuana as charged in the Indictment assess his punishment at confinement in the State Penitentiary for a period of 7 (seven) years.

/s/ Carl F. Thomas

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Possession of a Narcotic Drug, to-wit: Marijuana as found by the Jury, and that he be punished, as has been determined by the Jury, by confinement in the Penitentiary for Seven (7) years, and that the State of Texas do have and recover of the said Defendant, all costs in this prosecution expended, for which execution will issue; and that the said Defendant be remanded to jail to await the further order of the Court herein.

APPENDIX C

In the
COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

No. 50,099

ROBERT K. SWISHER, JR.,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

OPINION

This is an appeal from a conviction for the possession of marihuana. Punishment was assessed by the jury at seven years.

Appellant contends that "the trial court erred in not suppressing the marihuana seized in this case because the search and arrest was not based upon probable cause as required by the Fourth Amendment of the United States Constitution."

Napoleon Herrera, a Department of Public Safety intelligence agent, testified that he received information

from an informant that Robert Swisher was going to pick up a load of marihuana in the Fabens-Tornillo area near El Paso on the evening of October 12th or 13th, 1970. The informant also told Herrera that Swisher would be driving a white Rambler station wagon or a white pickup. Herrera had not received any prior information from the informant and the informant did not tell Herrera how he obtained his information.

Herrera drove to the intersection of Interstate 10 and Farm-to-Market Road 793. Herrera saw a white Rambler station wagon turn off Interstate 10 and onto Farm-to-Market Road 793 and proceed south. Herrera followed the car toward the Mexican border. Herrera testified that the station wagon was empty. Herrera stopped at the intersection of State Road 20 and Farm-to-Market Road 793 in the Fabens-Tornillo area. Approximately an hour later the station wagon passed Herrera traveling north. Herrera followed the car until another Department of Public Safety patrol car arrived. Herrera then pulled alongside the station wagon and shined a flashlight into the rear of the vehicle. Herrera testified that the back of the station wagon was full of brown packages wrapped in cellophane. Herrera then requested the patrol car to stop the station wagon. The Department of Public Safety officers stopped the station wagon and arrested appellant. Herrera opened a few of the packages in the rear of the station wagon. The packages contained marihuana.

The underlying circumstances which led to the informant's conclusion of guilt were not shown. There was no showing that the informant was credible and reliable. See Aguilar vs. Texas, 378 U.S. 108, 84 S.Ct.

1509, 12 L.Ed. 2d 723 (1964); Jones v. State, 522 S.W.2d 930 (Tex.Cr.App. 1975). The fact that an informant's tip does not satisfy the requirements of probable cause will not prevent an officer from investigating suspected criminal activity. In George v. State, 509 S.W.2d 347 (Tex.Cr.App. 1974), this Court wrote:

> "... Officers must have some reasonable leeway to investigate into criminal activity absent probable cause for an arrest or search."

See also Hernandez v. State, 523 S.W.2d 410 (Tex. Cr.App. 1975); Wood v. State, 515 S.W.2d 300 (Tex. Cr.App. 1974).

Officer Herrera's surveillance of appellant's automobile was proper, and, under the circumstances, Officer Herrera would have been remiss in his duty had he not investigated further after receiving the informant's tip. Cf. Torres v. State, 518 S.W.2d 378 (Tex. Cr.App. 1975).

During his surveillance of appellant's automobile, Officer Herrera pulled up alongside appellant's car and observed numerous brown packages wrapped in cellophane in the rear of appellant's car. Officer Herrera testified:

> " ... I pulled up along side, observed the packages that appeared to me to be the same type packages in which marihuana is normally wrapped in.
> "Q. What type of packages were they?

"A. These were packages wrapped in different color cellophane and brown paper.
"Q. Could you tell if there were numerous packages or how many packages there were?
"A. The back of the stationwagon was completely full.
"Q. Were these covered in any manner?
"A. No sir they were not covered, actually exposed.
"Q. After you observed that — let me ask you this Agent Herrera — had you seen any other items other than marihuana that had been wrapped in the same manner before?
"A. Not that I recall. I am sure there are some items that could be wrapped that way, but I don't know what they would be."

A police officer is expected to utilize his expertise and experience in assessing probable cause. Herrera's conclusion that the packages contained marihuana was reasonable in light of his prior experience. Thus, when Officer Herrera saw the packages of marihuana in the rear of appellant's station wagon he had probable cause to arrest appellant and search the automobile. See Hernandez v. State, supra; Onfore v. State, 474 S.W.2d 699 Tex.Cr.App. 1972). Appellant's third ground of error is overruled.

Appellant also contends that he was denied a speedy trial. In Davison v. State, 510 S.W.2d 316 (Tex.Cr.App. 1974), this Court wrote:

"The test for ascertaining whether the right to speedy trial has been denied is a balancing test based upon at least four criteria: (1) the length of delay; (2) the reason for the delay; (3) the accused's assertion of his right; and (4) the prejudice to the accused. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); Pete v. State, 501 S.W.2d 683 (Tex.Cr.App. 1973); McKinney v. State, 491 S.W. 2d 404 (Tex. Cr.App. 1973). During its present term, the Supreme Court of the United States has emphasized that none of these four criteria have 'talismanic qualities,' and, in particular, that a showing of prejudice is not sine qua non to demonstrating a denial of the right of speedy trial. Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973)."

He was arrested on October 12, 1970, and indicted on November 19, 1970. His bond was forfeited on December 4, 1970. The trial was held on June 17, 1974.

Three years and eight months elapsed from the date of arrest to trial. Such a delay is not, per se, a deprivation of a right to a speedy trial, although it is a fact which calls for further consideration of appellant's claim. Archie v. State, 511 S.W.2d 942 (Tex.Cr.App. 1974).

Appellant does not allege and the record does not reflect any deliberate effort by the State to delay the trial. He testified that an examining trial was conducted some time between the date of the arrest and the date the indictment was returned. The magistrate who conducted the examining trial concluded that there

was no probable cause for appellant's arrest. He related that he believed that the charges against him had been dismissed and that he did not know that an indictment had been returned against him. He moved to New Mexico after the examining trial and lived there until he was arrested on a fugitive warrant in January, 1974 and returned to El Paso in March of 1974. He was tried on June 17, 1974.

On March 28, 1974, appellant signed an "Agreed Order of Continuance" which set the trial date for June 17, 1974. The motion for a speedy trial was filed on June 11, 1974. He was tried six days after his request for a speedy trial.

Appellant claims he was prejudiced by the delay in his trial because he was unable to locate two witnesses and Officer Herrera's testimony was "dimmed by the passage of time." He testified at a pretrial hearing that Henry Garcia and Clay Melton asked appellant to deliver a load of alfalfa to some "hippies" and that he agreed to deliver the alfalfa for a fee of $150.00. Appellant also stated that he attempted to locate the witnesses by going to the house where he obtained the marihuana and asking the female resident, who did not speak English, "Is Henry here?" He also checked the telephone directory for the address of one of the witnesses.

> "When non-availability of witnesses is the basis of the alleged prejudice, an appellant must show that the witnesses were unavailable at the time he was tried; that their testimony may be relevant and material to his

> defense, and that due diligence was exercised in an attempt to locate such witnesses at the time he was tried." McCarty v. State, 498 S.W.2d 212 (Tex.Cr.App. 1973). See also Peak v. State, 522 S.W.2d 907 (Tex.Cr.App. 1975).

Applying the balancing test of Barker v. Wingo, supra, we conclude that appellant was not denied his right to a speedy trial. Appellant's first ground of error is overruled.

Appellant in his second ground of error contends that "the trial court erred in not accepting the State's motion to dismiss because it was a valid part of a plea bargain process estopping the State of Texas from prosecuting this case."

Appellant's attorney testified that an assistant district attorney agreed to dismiss the charges against appellant. After the trial court refused to dismiss, the State then withdrew the motion to dismiss and proceeded to trial. Article 32.02, V.A.C.C.P., provides:

> "the Attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge."

Article 32.02, supra, expressly provides that no case shall be dismissed without the consent of the

presiding judge. Thus, the trial court was not bound by the prosecutor's motion to dismiss the indictment. Appellant's second ground of error is overruled.

The judgment is affirmed.

Douglas, Judge

(Delivered May 26, 1976)

Roberts, J., dissents on the ground that the search was illegal.

APPENDIX D

In the
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

No. 50,099

ROBERT K. SWISHER, JR.,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

DENIAL OF MOTION FOR "LEAVE TO FILE" APPELLANT'S MOTION FOR REHEARING

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, June 16, 1976

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the appellant's Motion for Rehearing in Cause No. 50,099,
Robert K. Swisher, Jr.

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

GLENN HAYNES, Clerk

APPENDIX E

In the
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

No. 50,099

ROBERT K. SWISHER, JR.,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

ORDER GRANTING APPELLANT'S MOTION TO STAY EXECUTION OF MANDATE

On this day came on to be considered by the Court of Criminal Appeals the Appellant's Motion to Stay Execution of Mandate, and the Court is of the opinion that said motion should be granted.

Therefore, it is Ordered, Adjudged and Decreed by the Court that said motion be, and it is hereby, granted, and that the execution of the mandate of this Court in the above entitled and numbered cause shall be, and it is hereby, stayed pending the timely filing by

appellant of a petition for a writ of certiorari by the Supreme Court of the United States.

It is so ordered on this 28th day of June, 1976.

PER CURIAM

Filed in Court of Criminal Appeals June 28, 1976
Glenn Haynes, Clerk

APPENDIX F

SUMMARY IN ACCORDANCE WITH RULE 23(f)

In accordance with this Court's Rule 23(f), the following motion excerpts and points of error are presented. A federal question was raised at each judicial level below in a timely and proper fashion.

1. The following pleadings were part of the Petitioner's motions in the trial court:

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, 34TH JUDICIAL DISTRICT

DEFENDANT'S MOTION TO SUPPRESS

Now comes, ROBERT SWISHER, and moves the Court to grant the relief hereinafter prayed for, and as grounds therefor; shows the Court the following:

I.

. . . property which was unlawfully seized and taken by police officers . . . .

II.

. . . that said arrest, search, and seizure violated his federally secured constitutional right to be free from unreasonable arrests, searches, and seizures . . . .

WHEREFORE, this Defendant prays that the Court will, after proper hearing, enter an order suppressing and preventing evidential use against him of said property . . . .

DEFENDANT'S MOTION TO DISMISS

Comes now the Defendant, ROBERT SWISHER, by and through his attorney of record, JOSEPH (SIB) ABRAHAM, JR., and moves this Honorable Court for the dismissal of the indictment herein on the grounds that this Defendant was deprived of a speedy and public trial in violation of the 6th Amendment of the United States Constitution . . . .

DEFENDANT'S SECOND MOTION TO DISMISS

Comes now the above named Defendant and files this, his Motion to Dismiss the above entitled and numbered cause and as grounds therefor, would show this Honorable Court the following:

. . . That his case should be dismissed . . . , as the time element involved has effectively precluded Defendant's right to a fair trial as crucial and key witnesses who would testify both for and against Defendant are unavailable for trial, and would have been available had the State prosecuted this case within a reasonable time period.

DEFENDANT'S MOTION TO DISCLOSE

Now comes the Defendant in the above styled and numbered cause and files this motion to require the State to disclose the names and addresses of all persons who participated in any way and manner in the activities and investigations which lead to the arrest of this Defendant.

* * *

The names and addresses which are the subject of this motion are solely for the purpose of adequately determining the legality of the Defendant's arrest and incidental seizure of said items which are the basis of this prosecution . . . .

2. The following points of error were raised in Petitioner's Appeal and Motion for Rehearing in the Court of Criminal Appeals of the State of Texas.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

POINTS OF ERROR UPON APPEAL

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR A LACK OF A SPEEDY TRIAL BECAUSE APPELLANT'S RIGHT TO A SPEEDY TRIAL UNDER THE UNITED STATES CONSTITUTION HAD BEEN VIOLATED DUE TO CONDUCT OF THE STATE OF TEXAS.

* * *

II.

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE MARIJUANA SEIZED IN THIS CASE BECAUSE THE SEARCH AND ARREST WAS NOT BASED UPON PROBABLE CAUSE AS REQUIRED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

POINTS OF ERROR UPON MOTION FOR REHEARING

I.

THE ORIGINAL OPINION OF THIS COURT FAILED TO APPLY THE PROPER STANDARDS NECESSARY FOR A CONSTITUTIONALLY VALID STOP OF THE DEFENDANT'S VEHICLE.

II.

THE ORIGINAL OPINION OF THIS COURT INCORRECTLY APPLIED THE STANDARDS NECESSARY FOR A CONSTITUTIONALLY VALID SEARCH.

III.

THE ORIGINAL OPINION OF THIS COURT INCORRECTLY INTERPRETED THE APPLICABLE CONSTITUTIONAL STANDARDS IN ITS FINDING THAT THE DEFENDANT WAS NOT DENIED SIXTH AMENDMENT RIGHTS TO A SPEEDY TRIAL.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-264

* * *

ROBERT K. SWISHER, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

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* * *

NO. 76-264

* * *

ROBERT K. SWISHER, JR.,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For A Writ of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its duly authorized Attorney General, and files this its Brief in Opposition.

QUESTIONS PRESENTED

I. Whether there was a contitutionally impermissible delay in bringing the Petitioner to trial.

II. Whether the search of Petitioner's vehicle and subsequent seizure of contraband was impermissible under the Fourth Amendment to the Constitution of the United States.

STATUTES INVOLVED

1. The Fourth Amendment to the Constitution of the United States.

2. The Fifth Amendment to the Constitution of the United States.

3. The Sixth Amendment to the Constitution of the United States.

4. The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Robert K. Swisher, Jr., Petitioner herein, was arrested on October 12, 1970 for possession of marijuana. He was released on a surety bond in the amount of $7,500.00. A preliminary hearing was apparently conducted on or about October 28, 1970, at which time a justice of the peace found no probable cause for arrest.

On November 19, 1970, the case was presented to the Grand Jury of El Paso County, Texas. They returned an indictment for possession of marijuana. A precept to serve copy of indictment and a capias for arrest were issued on November 19, 1970. A notation was made on the capias by the Deputy Sheriff that the Petitioner was continued on bond. The precept was returned unserved on the Petitioner.

Petitioner was set for arraignment in the 34th Judicial District Court of El Paso County, Texas on

December 4, 1970. Petitioner did not appear and his bond was forfeited. In December of 1973, it was learned by the District Attorney's Office that Petitioner was in New Mexico. At that time, an effort was made to bring Petitioner back into the jurisdiction of the court. An alias capias was issued on January 16, 1974. Petitioner surrendered himself and was released on a new bond on March 18, 1974. He waived arraignment on March 21, 1974. He entered a plea of not guilty and proceeded to trial before a jury on June 17, 1974. Petitioner was found guilty and punishment was assessed by the jury at not less than two years nor more than seven years in the Texas Department of Corrections.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. The conviction was affirmed in, *Swisher v. State.* (No. 50,099, Delivered May 26, 1976).

STATEMENT OF FACTS

On October 12, 1970, Texas Department of Public Safety Officer Napoleon Herrera received information from an undisclosed informant that Robert Swisher would be receiving a quantity of marijuana in the Fabens, Texas area on the evening of October 12 or October 13. The informant further related that the Petitioner had long hair, a slender build and would be driving a white Rambler station wagon or pickup truck. Agent Herrera related this information to another Department of Public Safety unit and proceeded to set up a surveillance at the Fabens exit off Interstate 10 outside of El Paso, Texas. Agent Herrera was in an unmarked car.

While observing the east-bound traffic, Herrera noticed a white Rambler station wagon traveling east with a driver who fit the description given by the informant. He proceeded to follow the staion wagon as it

went south on FM 793 toward Fabens, Texas. While following the vehicle, he was able to see that it was empty of cargo at that time. Agent Herrera discontinued the surveillance as the vehicle approached Fabens.

Approximately thirty minutes later, Agent Herrera again observed the vehicle now headed north from Fabens. He pulled in behind the vehicle and followed it onto Interstate 10 heading west toward El Paso. He then informed the other Department of Public Safety unit of his location. The DPS patrol unit came up behind Agent Herrera and he then pulled alongside the station wagon on the left. He observed numerous packages approximately 2-1/2 to 3 inches thick, 5 inches wide and 7 to 8 inches long wrapped in cellophane and brown paper in plain view in the rear of the vehicle. From his experience Agent Herrera judged these packages to contain marijuana. Herrera dropped behind the vehicle and the patrol unit pulled alongside the station wagon and stopped it. The officers then approached the vehicle. The driver was identified as Robert K. Swisher, Jr., the Petitioner. Agent Herrera examined one of the packages and determined that it contained marijuana. Petitioner was then placed under arrest for possession of marijuana. A subsequent chemical analysis showed the 127 packages to contain 263.9 pounds of marijuana.

ARGUMENT AND AUTHORITIES

I.

The Delay in Bringing Petitioner To Trail Was Not Constitutionally Impermissible.

The balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972), should be applied to the case at bar. The four main factors to be considered are length of delay, the reason for delay, the Defendant's assertion of his right,

and prejudice to the Defendant.

Length of Delay

Petitioner was arrested on October 12, 1970. He was released on a $7,500.00 surety bond the next day. He was indicted on November 19, 1970 and failed to appear for arraignment on December 4, 1970. A judgment nisi forfeiting his bond was issued on January 20, 1971. Petitioner surrendered himself on an alias capias in March of 1974. He waived arraignment and was set for trial in June of 1974. On June 11, 1974, the Petitioner made a motion for a speedy trial. The trial was held on June 17, 1974.

Reason For Delay

Although Petitioner contends that he had no knowledge of the indictment, he was on a surety bond at the time the indictment issued. The indictment was a public record. Since the Petitioner was on bond at the time of his indictment, his bondsman was the party responsible for seeing that he appeared in court. When Petitioner failed to appear for his arraignment, his bond was forfeited. The State at that time considered Petitioner as a fugitive from justice and, upon learning of his whereabouts in a foreign state in December of 1973, the State initiated proceedings to bring him back within the jurisdiction of the court. Thus, the delay cannot be considered attributable to the State. Unlike the fact situation in *Dickey v. Florida*, 398 U.S. 30 (1970), and *Moore v. Arizona*, 414 U.S. 25 (1973), the State had no knowledge of the whereabouts of Petitioner until December, 1973. Once back in the jursdiction of the court, the State proceeded to trial within four months.

Prejudice To The Defendant

Three interests to be looked at as prejudicial to the

Defendant are: (1) To prevent oppressive pre-trial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. Petitioner was out on bond and was not incarcerated. Further, Petitioner testified that he suffered no anxiety or concern since he believed the charges to have been dismissed.

Petitioner contends, however, that he was prejudiced in not being able to present defense witnesses. He testified that he believed he was only hauling alfalfa, which was to be sold as marijuana. The two parties whom he alleged could corroborate his defensive theory were a man named Henry and a man named Clay Melton. Petitioner has not shown any diligence in trying to obtain the testimony of these witnesses. Petitioner stated at the pre-trial hearing that he knew Henry well, but could not remember if his last name was Garcia, Hernandez or Gonzales. He further stated that he went to the house where he had picked up the marijuana from Henry and asked in English, "Is Henry here." The woman who answered the door replied in Spanish and Petitioner was unable to determine what she said. As to Clay Melton, although allegedly a close friend of Petitioner, his only effort in trying to locate him was a search of the phone book and a visit to a house where Melton's mother once lived. No subpoena was requested for either one of these witnesses. Petitioner also testified that he was unable to locate the whereabouts of two professors as character witnesses who were no longer at the University of Texas at El Paso. He did not set forth any way that he tried to locate these professors. In weighing all of these factors, it is evident that the prejudice to Petitioner was minimal.

Striking The Balance

When the conduct of both the State and the Petitioner

is evaluated, it is apparent that the balance should be struct in favor of the State. There is no question that a lengthy delay between indictment and trial occurred. However, this delay cannot be attributed to the State. From the time Petitioner failed to appear for arraignment until his re-arrest, he was considered by the State as a fugitive from justice. There is no evidence of any inquiries made by either Petitioner or his attorney as to the charges that had been brought against him. Once Petitioner was brought back within the jurisdiction of the court, he was tried in four months. Further, the record refutes Petitioner's contention that his defense was impaired as a result of the delay. It is highly unlikely that the jury would have believed his story that he was hauling alfalfa even if corroborated by the other two men who supposedly hired him. It is also unlikely that even if available to testify, they would have appeared since their testimony would have been self-incriminating. The delay in this case was far more likely to benefit Petitioner than to harm him. The State's case was dependent upon the testimony of Agent Herrera. Had he not been available for trial, the State's case would have been destroyed. Respondent therefore contends that under the rationale of *Barker v. Wingo, supra*, Petitioner was not deprived of his due process right to a speedy trial.

II.

The Surveillance By the Law Enforcement Officers Established Probable Cause For The Search And Arrest.

As set forth in the Statement of Facts, the law enforcement officers conducted a thorough surveillance of the vehicle. Agent Herrera observed the empty vehicle described by the informant approach Fabens, Texas. The vehicle, on its return from Fabens, was

loaded with packages which, from Agent Herrera's experience, appeared to be marijuana. This surveillance, coupled with the informant's tip, constituted sufficient probable cause for a search of the vehicle. *See, United States v. Waddey*, 436 F.2d 632 (5th Cir. 1976).

The search of an automobile is far less instrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). While traveling on a public thoroughfare, a car is subject to public view. What a person knowingly exposes to the public is not subject to Fourth Amendment protection. *Katz v. United States*, 389 U.S. 347 (1967).

The thrust of Petitioner's argument goes toward the reliability of the informant. This approach ignores the surveillance by the officers which not only corroborated the informant's tip, but led to personal observation of criminal activity. *See, Draper v. United States*, 358 U.S. 307 (1957). Having probable cause for the stop, the search without warrant was permissible. *Chambers v. Maroney*, 399 U.S. 42 (1970).

The surveillance of Petitioner and observations by the peace officers provided more than adequate probable cause for the stop, search and subsequent arrest.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Anita Ashton, Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Respondent, and do hereby certify that three copies of the foregoing Respondent's Brief in Opposition have been served by placing same in the United States mail, first class, certified and postage prepaid, on this the ____ day of November, 1976, addressed to: Joseph (Sib) Abraham, Jr., Attorney for Petitioner, 505 Caples Building, El Paso, Texas 79901.

ANITA ASHTON
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-264

ROBERT K. SWISHER, JR.,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals For the State of Texas

PETITIONER'S BRIEF IN REPLY TO THE STATE OF TEXAS BRIEF IN OPPOSITION

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Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals for the State of Texas

PETITIONER'S BRIEF IN REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

The Petitioner, JOHN DAVID MOORE, JR., having filed his Petition For A Writ of Certiorari and having received the brief of the State of Texas in opposition, respectfully submits his reply to the brief of the State of Texas in opposition.

OPINIONS BELOW

The judgment and sentence of the jury entered on June 20, 1974 in this cause in the 34th District Court of the State of Texas is included in Appendix B of the Petition For a Writ of Certiorari.

The opinion of the Court of Criminal Appeals of the State of Texas delivered on May 26, 1976 and affirming the District Court judgment, cause number 50,099, ____ S.W.2d ____, has been reproduced in Appendix C of the Petition For a Writ of Certiorari.

The official notice of the denial of the Appellant's Motion For Leave to file Petition for Rehearing from the clerk of the Court of Criminal Appeals dated June 16, 1976 appears in Appendix D of the Petition For a Writ of Certiorari.

The per curiam order of the Court of Criminal Appeals, granting the Appellant's Motion to Stay Execution of Mandate dated June 28, 1976 is included in Appendix E of the Petition For a Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Criminal Appeals of the State of Texas was on May 26, 1976. A Motion for Leave to File Petition for Rehearing was timely filed, and denied on June 16, 1976. This Petition for Certiorari was timely filed within ninety (90) days of both the above dates. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I.

Whether a delay of thirty-six (36) months during which the State failed to notify the accused or his attorney of the resumed prosecution against him constitutes a denial of speedy trial and due process.

II.

Whether a general, undetailed tip from an untested informant who did not give the source of his information could support the stop and search of the Petitioner's moving vehicle.

CONSTITUTIONAL PROVISIONS INVOLVED

The following portion of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

The following portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law, . . ."

The following portion of the Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, . . ."

REPLY TO THE ARGUMENT OF THE STATE OF TEXAS

(1) Whether A Delay Of Thirty-six (36) Months During Which The State Failed To Notify The Accused Or His Attorney Of The Resumed Prosecution Against Him Constitutes A Denial Of Speedy Trial And Due Process.

In dealing with the Petitioner's first question above, the State of Texas put forth three main ideas in rebuttal: (1) That during the thirty-six (36) month period between arrest and the issuance of a fugitive warrant, the Defendant was, or was considered to be, a "fugitive" (Resp. 5); (2) that notice of the resumed prosecution to the Defendant's bondsman was sufficient (Resp. 5); and (3) that the Defendant failed to prove prejudice from the delay (Resp. 5-6).

A.

There is simply no evidence that Robert K. Swisher was ever considered a fugitive as alleged in the State's Brief (Resp. 4). First of all, the arrest capias of November 19, 1970 (Resp. 2) which was returned "unserved" and with the notation "continued on bond" does not appear in the appellate record at all (see R. 378-385). No arrest capias appears in the record until the end of the thirty-six month period (R. 385). As for the arraignment setting which prompted the bond forfeiture, no notice of it appears in the record (R. 378-385), in sharp contrast to the notices issued after the

thirty-six month period which are included in the appellate record (R. 388, R. 389, R. 390). Thus, the documentary record offers silent but clear support of the Defendant's contention that he was denied notice and due process.

The testimony also does not support the contention that the State of Texas "considered" Robert K. Swisher, Jr. a "fugitive." (Resp. 5) The Defendant testified that he had no knowledge of the resumed prosecution (Tr. 78-100, 114-116); his attorney testified that he had not received any such indication (Tr. 118-121); and even more importantly three Assistant District Attorneys for the State were called to the stand and in their testimony (Tr. 60-74, 142-154, 136-142, 155-158) failed to make even the assertion that Robert Swisher, Jr. was "considered" a "fugitive." In a somewhat unusual procedure, the trial attorney for the State, Mr. Albert Weisenberger took the stand himself, but he too did not characterize the Defendant as being "considered" a "fugitive" before December, 1973 (Tr. 116-118), nor did he make such a characterization in his final argument (Tr. 177-180) against the Defendant's motion to dismiss for lack of a speedy trial. Counsel for Defendant apologizes for subjecting this august body to such a mass of citations to the record and the transcript, but feels compelled to do so in order to rebut this rather late and inaccurate assertion by the State which tends to obscure the important legal issues involved in this case.

B.

As for the State's assertion that the notice of the resumed prosecution which was supposedly given to the Defendant's bondsman was adequate notice, the Petitioner would like to make two brief points. First, there is no indication in the record of any notice being given of the resumed prosecution to the Defendant or his bondsman until December, 1973 (R. 378-385). The *Judgment Nisi* (R. 384) regarding the bond forfeiture does not reflect that it was delivered to the bondsman, and the record is silent as to even an attempt at execution upon that judgment (R. 378-385). Secondly, and even more importantly, there is no support in the body of the law for the idea that a Defendant's constitutional right to notice and due process can be delegated to a bondsman and become dependent on his industry or lack of same. All in all, neither the facts nor the law lends any credence to the State's assertion that this Defendant received notice of the resumption of prosecution in his case.

C.

The State of Texas contends that the Petitioner failed to adequately prove that he was prejudiced by the thirty-six (36) month hiatus in his case. The State is able to maintain this position only by failing to come to grips with the Petitioner's contentions that such a lengthy delay creates a presumption of prejudice. *United States v. West*, 504 F.2d 253 (D.C. App. 1974); *United States v. Macino*, 486 F.2d 750 (7 Cir. 1973); *United States v. Calloway*, 505 F.2d 311 (D.C. App. 1974); and that only a showing of "a reasonable possibility of

significant prejudice" is necessary, *United States v. Holt*, 448 F.2d 1108 (1971); *Harling v. United States*, 401 F.2d 392, (D.C. App. 1968) cert. den. 393 U.S. 1068, 89 S.Ct. 725, 21 L.Ed. 711 (1969). Additionally, Petitioner would reassert his position that he has been subjected to significant prejudice from his thirty-six month delay, specifically in securing witnesses for cause both on the merits and on punishment (Tr. 83-92); and in being denied the right to order his life by the failure of the State of Texas to notify him or his attorney of the resumption of prosecution for some three years, thus denying him even the right to demand a speedy trial.

This Court has held that a showing of actual prejudice is not sine qua non for demonstrating a denial of speedy trial, *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); nonetheless, in this case, the Petitioner feels he has demonstrated a "reasonable possibility of significant prejudice," *Holt, Supra; Harling, Supra.*

(2) Whether A General, Undetailed Tip From An Untested Informant Who Did Not Give The Source Of His Information Could Support The Stop And Search Of The Petitioner's Moving Vehicle.

In replying to the brief treatment of the above search question by the State of Texas, the Petitioner would make two points: (1) that the facts supporting the officer's suspicions are not as strong as the State would have us believe; and (2) that legal precedents cited by the State in support of its contention that the insufficient tip was rehabilitated or corroborated by surveillance are not applicable to the facts of this case.

A.

In regard to the facts available to the Police Officer, the State contended that upon the surveillance of Robert Swisher's vehicle, the Officer "judged these packages to contain marijuana," (Resp. 4). After noting that this Officer's view of the packages was in the dark between two moving cars, and with the aid of a flashlight, the Petitioner would point out the Officer's actual testimony as to the composition and appearance of the "packages."

A. I don't believe a bag, just cellophane wrapping.
Q. All right. Now is the brown paper transparent?
A. No sir, it is brown wrapping paper as used in the meat market, or brown shopping bags.
Q. In other words, if you picked it up you would not be able to see the vegetation inside?
A. That is correct, you would not.
Q. You say it also had a plastic wrapping around the brown paper.
A. To the best of my recollection, yes it did.
Q. Are you certain about that?
A. Not 100% certain, no sir.
Q. Are you certain that all of these packages had this brown paper on them?
A. Yes sir. (TR 43)

Indeed, the Officer went on to say that he had seen marijuana packaged that way, but he added in the

same breath that he was "sure" that other items could be wrapped that way (TR 32).

B.

The State's precedent for contending that its insufficient tip was rehabilitated was *United States v. Waddy*, 536 F.2d 632 (5th Cir. 1976) cited in the State's Brief as *United States v. Waddey* (Sic), 436 (Sic) F.2d 632 (5th Cir. 1976). (Resp. 8) *Waddy* and its cited precedent, *Weeks v. Estelle*, 531 F.2d 780 (5 Cir. 1976), involve a different fact situation than that found in *Swisher*. *Waddy* and *Weeks* involve *reliable* informants giving insufficient tips, not an untested informant giving an insufficient tip as is the case in *Swisher*. However, even if one were to use *Waddy* as a precedent, it would not support a finding of probable cause. Actually, the closest case, *United States v. Bursey*, 491 F.2d 531 (5 Cir. 1974) is cited in *Waddy*, but distinguished from the *Waddy* facts. The *Bursey* court cited *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and pointed out:

> "Moreover, the surveillance in this case, as in *Spinelli*, contained no reasonable suggestion of criminal conduct when the appellants' actions as observed are simply taken by themselves, and *Spinelli* clearly teaches that otherwise innocent conduct is not imbued with "an aura of suspicion by virtue of the informer's tip" where the tip fails to comport with the *Aguilar* requirements. *Spinelli*, *supra*, at 418, 89 S.Ct. 584, 590. Changing drivers in a public parking lot in broad

> daylight and an impression by an agent at the end of a long night's vigil that a car trunk was sagging more than it had the night before simply cannot, in themselves, warrant a finding of probable cause." *Bursey*, at 534.

In *Swisher*, instead of a sagging trunk, we have cellophane and the sort of "brown wrapping paper used in the meat market," (TR 43).

Thus, the *Swisher* facts fail to meet even the requirements of *Waddy*, *Weeks*, and *Bursey*. However, the Petitioner would point out again that *Waddy*, *Weeks*, *Bursey*, and *Spinelli* involve *reliable* informants giving tips which are insufficient in some manner under the *Aguilar* test. In *Swisher*, we have entirely different facts which can be summarized as follows:

1. An untested informant. (TR 17)

2. No assertion by the Police Officer that he was reliable. (TR 11-17)

3. A general, undetailed tip. (TR 11-17)

4. No information as to how the informant gained his information. (TR 17)

5. No information as to when the informant gained his information or whether it was stale or not. (TR 17)

We can see that the above tip is not an *Aguilar* tip at all because it fails to meet the requirements of either prong or any portion thereof. *Swisher* is the case of an untested informant giving a totally insufficient tip.

Strangely enough, this tip's inadequacy, its failings, its very generality is all that supports the State's claim to any corroboration at all. For instance, in *Waddy*, the "reliable" informant mentioned "that the marijuana was going to be carried in suitcases," *Waddy*, at 633. The *Swisher* informant failed to advise the Officer how the marijuana would be carried, contained, packaged or whatever. In *Waddy*, the Officers noted the presence of suitcases in their surveillance, and those suitcases provided part of the corroboration. In *Swisher*, suitcases, a sagging trunk, extra spare tires, brown packages, or virtually anything the Officer encountered would tend to be somewhat corroborative, simply because of the very inadequacy and generality of the tip. Can it be that the worst possible tip is the one easiest to corroborate? Surely, this cannot be the case.

FINAL ARGUMENT AND CONCLUSION AS TO WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

Looking at the question of whether this Petitioner was denied a speedy trial in this instance, we find an interesting fact situation. In *Swisher*, the defendant was denied a speedy trial for some thirty-six (36) months, and because of the lack of notice on the part of the State of Texas as to its resumption of prosecution, he was also denied the right even to request a speedy

trial. The Petitioner feels that this novel fact situation provides an appropriate and compelling reason for review by this Court.

The second issue concerns itself with the question of whether a general, undetailed tip from an untested informant who did not give the source of his information can support the stop and search of the Petitioner's vehicle, and the question of whether such a grossly inadequate tip can be rehabilitated by the observation of activities and items which could be innocent except when "endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli*, 393 U.S. at 419. If we allow the *Swisher* tip to be rehabilitated thusly, we must completely give up the concerns of *Aguilar* and *Spinelli* that tips might be made up from rumor or out of whole cloth by the informer or others. Realizing this, this Petitioner appeals to this Court in its role as guardian of the Bill of Rights, and requests review under a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of December, 1976.

Of Counsel